State of New Hampshire
OFFICE OF ATTORNEY-GENERAL

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Opinion

July 7, 1958

Lawton B. Chandler, Secretary
State Tax Commission
Concord, New Hampshire

Dear Sir:

Some time ago you directed our attention to the decision of the Supreme Court of the United States in the case of City of Detriot v. Murray Corporation (decided March 3, 1958), and you inquired if, had the incidents giving rise to the tax in that case taken place in New Hampshire, the laws of this State would have authorized the imposition of a tax in respect thereto.

A careful study of the opinion of the Court, together with a consideration of the views of the dissenting Justices, leads us to the conclusion that under our laws a tax would not have arisen out of the circumstances of this case.

The facts are set forth succinctly in the opinion:

"In 1952 Murray Corporation was acting as a subcontractor under a prime contract for the manufacture of airplane parts between two other private companies and the United States. From time to time Murray received partial payments from the two prime contractors as it performed its obligations under the subcontract. By agreement, title to all parts, materials and work in process acquired by Murray in performance of the subcontract vested in the United States upon any such partial payment, even though Murray retained possession.

"On January 1, 1952, the City of Detroit and the County of Wayne, Michigan, each assessed a tax against Murray which in part was based on the value of materials

and work in process in its possession to which the United States held legal title under the title-vesting provisions of the subcontract."

Upon litigation, the Supreme Court upheld the validity of the tax.

The rationale employed by the majority of the Court in reaching its conclusion is subtle, elusive and difficult of understanding, a fact attested in the language of certain of the dissenting Justices as they attempt to describe it. See, e.g., dissent of Mr. Justice Harlan. It does appear, however, that the majority relied upon the concept that the Michigan statute under which the tax was levied, although not expressing such purpose in terms, reflected an intention to lay the tax upon the persons in possession of the property "'for the privilege of using or possessing'" (majority opinion) it. The generating source of the tax, then, seems to be not the property itself but rights - legal or practical - which the possessor may have with respect to it. Mere possession is not sufficient; the Court notes that possession is a valuable right "when the possessor can use [the property] for his own personal benefit." (majority opinion - emphasis added).

Taxes assessed in New Hampshire under authority derived from Const. II, Art. 5, are laid directly upon the property itself. They are, of course, necessarily assessed to a person, and the "annual tax is a burden placed upon ownership" (Opinion of the Justices, 82 N.H. 561, 568) although quite properly an interest less than one in fee is recognized as a subject of taxation. Piper v. Meredith, 83 N.H. 107. The provisions of RSA 73:4 directing taxation to a person merely in possession is obviously a rule of expediency in the mechanical process of collecting a tax. It is neither limited by nor does it arise from any such concept as was expressed in the majority opinion of the Court quoted above to the effect that possession of property is taxable when coupled with a right on the part of the possessor to use the property for his own personal use. RSA 73:4 does not tax the possessing; it taxes, rather, the property.

In recognition of the nature of our general property tax - of which the stock in trade tax is a part - and in the view that there is no similarity between it and that imposed by the Michigan statute as interpreted by the Supreme Court of the United States, we believe that the circumstances set forth in the Murray case would not give rise to the application of a tax in New Hampshire.

Very truly yours,

Warren E. Waters
Deputy Attorney General